UNITED STATES DEPARTMENT OF AGRICULTURE
FARM CREDIT ADMINISTRATION
WASHINGTON, D. C.

# SUMMARY OF CASES

# RELATING TO

# FARMERS' COOPERATIVE ASSOCIATIONS

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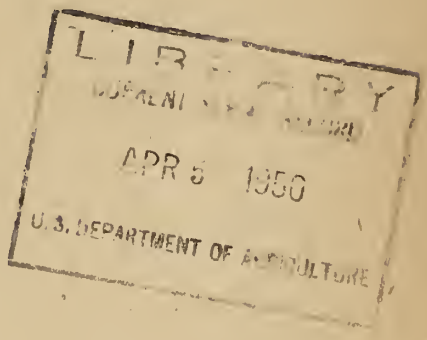


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For the

COOPERATIVE RESEARCH AND SERVICE DIVISION

Summary No. 45

March 1950

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## NONPROFIT COOPERATIVE FREIGHT-FORWARDING ASSOCIATION

The Pacific Coast Wholesalers' Association is a cooperative corporation which was organized by a small group of dealers in automotive parts at Los Angeles, California. It was organized "to provide a means of assembling, consolidating, forwarding and distributing freight for its members, on a nonprofit basis, and for the purpose of securing the benefits of carload, truckload, or other volume rates . . . . No freight is handled for nonmembers. . . ."

Part IV of the Interstate Commerce Act deals with freight forwarders and gives the Interstate Commence Commission jurisdiction over freight forwarders that are not exempt from the provisions of that Act. Section 402(c) of Part IV of the Act (49 U.S.C. 1002(c)) reads as follows:

> "The provisions of this chapter shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed." (Underscoring added.)

The Pacific Coast Wholesalers' Association, believing that it was exempt under the provisions of the statutory provision just quoted, did not file an application with the Interstate Commerce Commission for a permit to operate as a forwarder of freight, and the Interstate Commerce Commission in a report dated November 26, 1945, held that the association was exempt. Later, upon the petition of the Freight Forwarders Institute, as intervener, the proceedings were reopened, and the Commission in brief held that the Pacific Wholesalers' Association was not exempt with respect to less-than-carload lots on which the consignors paid the freight to their destination in California. This conclusion seems to have been based upon the assumption that the association was holding itself out to the general public as a forwarder of freight, and also on the theory that it was not operating on a nonprofit basis with respect to less-than-carload lot shipments that were consigned F.O.B. destination.

The association then instituted proceedings against the United States (81 F. Supp. 991), and the Interstate Commerce Commission and the Freight Forwarders Institute then intervened.

The shipments in question all involved transactions in which shipments originated in the East and were consigned to the association in Chicago upon the instructions of its members. In Chicago, the shipments of the members were "consolidated in carloads and forwarded to destinations or break-bulk points and distributed to members of the association or to their customers in the destination areas. . . ."

Without going into details with respect to how the various shipments in question were handled, it appears that they were handled in substantially the following manner: Consignors of freight of less-than-carload or truckload shipments paid the freight on the shipments to their destination in Los Angeles. These less-than-carload shipments, when they were received in Chicago, were consolidated by the association into carload lots. By consolidating the less-than-carload lots or less-than-truckload lots into carloads or truckloads, savings in freight were effected, and these savings were collected by the association and paid by the association to its members. In the report of the Interstate Commerce Commission dated December 18, 1947, it is said:

> "Simple logic would dictate the conclusion that in handling shipments on which freight is borne by nonmember-consignors, the association is operating for hire and therefore for profit."

In the same report, the Interstate Commerce Commission also said:

> "These differences or 'savings' are paid to the member consignees, regardless of the fact that the charges were collected from the consignors."

The Court, in holding that the association was operating on a nonprofit basis and that it did not hold itself out to the general public as a forwarder of freight said:

> "That the association at all times acts solely at the request, and under the direction, and for the account and benefit, of the member-purchaser. As between member and association, then, the former always acts as principal, the latter as agent.
>
> "The existence of this agency is implicit in the findings of the Commission. The report states that 'All of the shipments involved are consigned * * * upon instructions of the members' of the association. Admittedly, the facilities of the association are not available to a non-member shipper otherwise than through arrangements made by a member. And the necessary arrangements are that the member as principal instruct the association as agent to handle the shipment. Moreover, both the purpose and the result of the transaction is not to benefit the shipper, but to reduce transportation costs to the member through savings effected in cooperation with other members who likewise employ the association as transportation agent.
>
> "When this principal-agent relationship between member-purchaser and the association is borne in mind it is clear that there is no profit to the association from the activities described in the Commission's report, 49 U.S.C.A. § 1002(c); and it is equally clear that the association, as agent for the members, does not 'hold itself out to the general public to * * * provide transportation of property * * * for compensation.' 49 U.S.C.A. § 1002(a) (5)." (Underscoring added.)

As pointed out above, it is clear that the association acted only at the request of its own members, and hence the association was not holding itself out to the public as a general forwarder of freight. Likewise, because the savings in transportation costs that the association was able to obtain by consolidating the less-than-carload or truckload lots of its members into carloads or truckloads were reflected back to its members, the association functioned on a nonprofit basis. It was the fact that it was in the contemplation of the members of the association and of the association itself that the savings which the association was thus able to effect would be reflected back to its members which resulted in the association's operating on a nonprofit basis. Indeed, this is the reason the association was formed.

The particular mechanics by which the savings were effected through cooperative action are not material in determining the nonprofit character of an organization. The members of the association wanted to reduce the transportation costs on automotive parts which they purchased in the East. The association was a means of accomplishing this result. It appears clear that the savings effected were distributed on a patronage basis.

In United States v. Pacific Coast Wholesalers' Association, 18 LW 4152, decided by the United States Supreme Court on February 6, 1950, the decision of the trial court was affirmed.

This case seems to establish that any business may be operated cooperatively on a nonprofit basis by making prior appropriate contracts to bring about this result; and, of course, any business that functions on a nonprofit basis has no income taxes to pay.

SCOPE OF "CAPPER-VOLSTEAD ACT" FOR FISHERMEN

Local 36 of International Fishermen & Allied Workers of America, an unincorporated organization, was indicted, together with its officers, the so-called agent and assistant business agent of Local 36, and a number of individual fishermen who were members of Local 36, charged with violating the Antitrust Act, 15 U.S.C., section 1. No third persons were indicted. The case was tried before a jury, and all of the defendants were convicted, whereupon they appealed. The judgment of the Trial Court was affirmed in Local 36 of International Fishermen & Allied Workers of America, et al., v. United States, 177 F. 2d 320.

Although Local 36 functioned in some respects in a manner comparable to a labor union, it was alleged in the indictment that the fishermen who were members of Local 36 "are not employees, workers, or laborers who receive a salary or wage for their work or labor, but are independent businessmen engaged in business on their own account, and who operate fishing boats for their own account and profit." The jury found that this allegation of the indictment was true, and, as indicated, it was upheld on appeal. Local 36 as an organization did not engage in the catching of fish, nor in the sale of fish caught by its members. In brief, the manner in which the association operated was substantially as follows. Minimum prices for various kinds of fish were agreed upon, and members of Local 36 were permitted to sell their fish to dealers who had entered into a standard form of contract with Local 36. A large percentage of the fishermen in the area in question were members of Local 36.

The indictment, among other things, charged that the defendants engaged in activities to prevent fishermen who were not members of Local 36 from fishing at all, that the defendants boycotted and picketed any concern or individual attempting to deliver fish to any dealers who had not signed a contract with Local 36, that the defendants attempted to prevent fish dealers who had not signed a contract with Local 36 "from shipping or otherwise transporting through their own or other means of transportation any fish purchased or acquired by said dealers," and that the defendants by boycotting and establishing picket lines around the places of business of fish dealers who had not entered into contracts with Local 36 attempted to prevent them from securing a supply of fresh fish.

The defendants attempted to show that Local 36 was a labor union and that because of the Clayton Act and the Norris La Guardia Act, the indictment could not be upheld. The defendants also contended that they were protected by the Fishermen's Marketing Act, 15 U.S.C. 521. This Act is identical in purpose, and to a large degree identical in language, with the Capper-Volstead Act with respect to cooperative marketing associations of farmers, 7 U.S.C. 291, except of course that it relates exclusively to fishermen.

As indicated, the Circuit Court of Appeals held that Local 36 was not a labor union because the jury had found that it was composed of independent

businessmen who were self-employed and who were not the employees of anyone. On account of this fact, the provisions of the Clayton Act and the Norris La Guardia Act with respect to labor unions were held to have no application. The Court of Appeals also held that the acts of which the defendants had been convicted were not authorized by the Fishermen's Marketing Act. All of such acts would appear clearly to be acts that no business concern of any character could lawfully engage in. Although Local 36 had not conspired with third persons, Local 36 and its indicted officers and members had engaged in acts and conduct that violated the rights of third persons. The Fishermen's Marketing Act ("Capper-Volstead Act") was held not to authorize Local 36 or its members to violate the rights of third persons. This simply meant that Local 36 and its members were on a par in this respect with other business concerns.

A number of significant quotations from the opinion are here given:

"We have no occasion to consider whether, standing alone, a charge of the execution of this contract by dealers and fishermen belonging to the organization would have stated a violation of the statute or not. But the indictment must be considered as a whole. A charge which indicates that 75% of the fishermen, as independent businessmen belonging to the organization, agreed not to let any fishermen fish in the high seas and in the territorial waters of Southern California and Mexico or to deliver fish to any other than a cooperating dealer except on the specified conditions, whether by their consent or not, is a charge of a conspiracy in direct and illegal restraint of interstate and foreign commerce.

* * * * * *

"The corollary also charged established by proof that fishermen not belonging to the association were prevented from fishing at all on the high seas or in territorial waters unless they were subservient to the conspirators. The evidence showed that noncooperating boats owned by independent fishermen were dubbed 'unfair' and were warned to conform.

* * * * * *

"The ends desired by the appellants according to the evidence were accomplished by picketing and boycotting and by unconcealed threats of violence and pressure.

* * * * * *

"On the evidence, however, a finding that the fishermen members of the association were 'independent businessmen engaged in business on their own account and who operate fishing boats for their own account and profit' was justified. It might also have been possible to find that Local 36 was an association under the Fishermen's Marketing Act and that the members were joined together for the collective purpose of carrying on legitimate objectives of 'catching, producing, preparing for market, processing, handling and marketing

fish caught by their members.' Although it was not possible to find from a review of the record that in this instance the association was acting as the marketing agent for the members, still the evidence does show that, so long as the efforts of the members and the Local were confined to an agreement among themselves and the dealers, arrived at by negotiation and setting of certain price levels for fish to be caught, but having no coercive force behind it, no action was taken by the Government. This is also the explanation of the dismissal of the prosecution in a case based upon that feature alone. This position may be subject to question, but at least it does not affect the problem here. However, the record shows that the fishermen here viewed as members of a cooperative had much broader purposes underlying the concert of action above outlined.

* * * * * *

"If, in fact, in all they did, as the evidence shows, they were acting as members of a marketing cooperative, it would afford them no sanctuary for collaboration with others outside the association. United States v. Borden Company, 308 U.S. 188, 60 S. Ct. 182, 84 L. Ed. 181.

* * * * * *

"The Court properly instructed the jury that an organization formed under the act might enter into a contract with a buyer of fish, which fixes the price 'at which the association itself or as sale agent for its members sells on behalf of its members the fish caught or to be caught by the members of the association to a buyer.' This charge fairly set out what the appellants could ask lawfully.

* * * * * *

"Again, there is no law which permits the farmer who does his own work on his own farm to combine with other farmers similarly situated to raise the price of grain by picketing all grain dealers or the dealer of their choice at the time.

* * * * * *

"Here the intent charged was not only to fix prices but also to prevent independent fishermen from fishing on the high seas and in foreign waters and from selling the catch so obtained to non-cooperative dealers in the territorial area." (Underscoring added.)

From some of the quotations given above, it would appear that the Court was of the opinion that the association of fishermen came within the scope of the Fishermen's Marketing Act, but that the acts and conduct for which the defendants were convicted were not authorized by that Act.

The case under discussion is in a number of respects similar to the case of Columbia River Packers Association v. Hinton, 34 F. Supp. 970, 974, reversed on ground labor dispute involved 117 F. 2d 310 reversed on ground--no labor dispute involved, 315 U.S. 143, 62 S. Ct. 520, 86 L. Ed. 441, Summary No. 14, p. 1, in which the Court found that the association was not a labor union because composed of independent fishermen, and in which the Trial Court expressed the view that the Fishermen's Marketing Act did not authorize such an association to enter into a contract with a buyer of fish under which the association did "not guarantee a supply of fish" and yet barred the buyer from buying fish from others.

In the case of Producers' Crop Improvement Association v. Dallman, 178 F. 2d 66, the question for decision was whether the employees of the association were engaged in agricultural labor. The association was composed of some 12,000 farmers. The sole purpose for the existence of the association "is to produce an adequate annual supply of high quality hybrid corn seed for its members, to be used by them in the production of the next ensuing commercial corn crop."

The association entered into contracts with some twenty or thirty farmers each year, under which these farmers grew hybrid seed corn under the supervision and control of the association. The Trial Court held that the association was a terminal market within the meaning of the statute, and therefore held that the employees of the association concerned were not engaged in agricultural labor.

The Circuit Court of Appeals, however, held that the employees of the association were acting for and on behalf of its 12,000 members, and that the employees of the association were engaged in the performance of agricultural labor as an incident to ordinary farming operations of the individual members of the association, and that the association was not a terminal market. Therefore, the judgment of the Trial Court was reversed.

The suit was brought by the association to recover taxes which the association had paid under the Federal Insurance Contributions Act, 26 U.S.C. 1400 et seq., and under the Federal Unemployment Tax Act, 26 U.S.C. 1600 et seq. In reversing the Trial Court, the Circuit Court said in part:

> "The sole question involved is whether plaintiff's employees were engaged in 'agricultural labor,' which is similarly defined in each of said Acts. If plaintiff's employees were so engaged, then the tax under each Act was illegally assessed and collected and plaintiff is entitled to recover. If they were not so engaged, as the lower court found, the judgment denying recovery is proper and must be affirmed.
>
> "Sec. 1426(h), as amended by the Social Security Act enactments of 1939, defines 'agricultural labor' under four categories. Par.(h)(4) is the one about which the instant controversy revolves. So far as here material, it provides:
>
> "'The term "agricultural labor" includes all services performed--
> * * *
>
> "'(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market * * * any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the

preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed * * * in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.'

* * * * * *

"The sole utility of hybrid corn is for seed to be used by the farmer who produces the commercial crop. Plaintiff had nothing to do with the latter. Hybrid seed corn must be purchased each year by the farmer engaged in producing the commercial crop.

"To secure an adequate annual supply of hybrid corn seed for its member growers of commercial corn, plaintiff each year enters into contracts with selected farmers to grow corn which subsequently becomes the hybrid seed required for the next commercial crop. As the court found, 'To that end, the plaintiff contracted each year with a small number of farmers who agreed to grow corn seed under the conditions and for the compensation provided by written contracts between each of them and plaintiff.'

"After the corn was grown and harvested, it was received in the form of ear corn at plaintiff's plant at Piper City, Illinois, where it was sorted, shelled, dried, graded, tested, treated with a fungicide, packaged and labeled. Without this service, the corn would have been worthless for the purpose for which it was intended, that is, as hybrid seed to be used in the production of a commercial crop. No question is raised but that the services rendered on the farm in the production of the ear corn were agricultural labor; in fact, the court found that such services were performed as an incident to ordinary farming operations. The services rendered by employees of the plaintiff at its plant, necessary to the completion of the process of producing hybrid corn for its members, are those in dispute and which the court concluded were not agricultural labor within the terms of the statute. This determination was predicated upon the finding that 'The plaintiff was the terminal market for the seed corn delivered to its plant' and that 'The processing operations in issue were performed after delivery of the seed corn to a terminal market for distribution for consumption.' Thus, under these findings, the services in dispute are removed from what otherwise would constitute agricultural labor as defined in Par. (h) (4) above quoted.

* * * * * *

"That the corn was produced for the plaintiff solely under its control and supervision in every detail from the beginning to the end is hardly open to question. This is clearly shown by the undisputed testimony of Mr. Lloyd R. Downs, Agricultural Association Manager of plaintiff, who had served in such capacity for more than eight years, or since the time of plaintiff's organization. He

stated: 'We furnish the foundation seed. In many instances we furnish our corn planters and our own farm tractors and we supervise it all. By contract agreement he [the farmer] cultivates the corn. We in turn grow this corn, go through and pick out the untrue plants and cut them out. We will stake the fields as to the female and male plant. We plant six rows of female, that is the single cross, two rows of another single cross, which we have predetermined will be the male. We must properly identify them so we will not detassel the male corn. We must stake the rows for identification. We use our own detasseling equipment, and we employ and supervise all the labor. We own our own equipment, personally pick all of the corn and bring it to the members' plant * * *.' This witness further testified that the grower did not deliver the seed to plaintiff's plant but that plaintiff's employees went to the fields, harvested it and brought it into the plant; that the harvest took place between September 1 and November 1, but not later than the latter date in order to prevent freezing; that the grower was obligated to follow plaintiff's advice and supervision, and that the crop was being grown for the association from the time the seed was delivered to the grower." (Underscoring added.)

The decision of the Trial Court that the association was a terminal market, and therefore that the employees concerned were not engaged in agricultural labor appears to have been based largely on the case of Miller v. Burger, et ux, 9 Cir., 161 F. 2d 992, 993, in which the Court held that the Rosenberg Company, in the operation of its plant at Fresno, California, was a terminal market insofar as the farmers who delivered dried fruit to that market were concerned, which dried fruit was processed in the plant of the Rosenberg Company at Fresno, California.

In the instant case, the Circuit Court of Appeals said:

"While we think that the rule announced in the Burger case is not applicable here and consequently disagree with the theory upon which the lower court decided in favor of the defendant, we also are not able to accept plaintiff's contention as to why the judgment should be reversed. Plaintiff's theory appears to rest on the premise that it as a cooperative was acting for and on behalf of its contract growers of corn. Thus it is argued that if the services in question had been performed by the grower on his farm they would have constituted agricultural labor and, therefore, would be exempt, and that inasmuch as the services rendered by the plaintiff were for and on behalf of the grower they are likewise exempt. Numerous cases are cited in support of this reasoning, such as Matter of Lazarus, 268 App. Div. 547, 52 N.Y.S. 2d 682; Cache Valley Turkey Growers Ass'n v. Industrial Commission, 106 Utah 1, 144 P. 2d 537; Industrial Commission v. United Fruit Growers Ass'n, 106 Colo. 223, 103 P. 2d 15; Yakima Fruit Growers' Ass'n v. Henneford, 182 Wash. 437, 47 P. 2d 831, 833, 100 A.L.R. 435. Without discussing these and similar cases in detail, it is sufficient to note that they in one form or another are based upon the premise that the services

were rendered for and on behalf of the farmer or grower, and services rendered by a growers' cooperative have been found to be in that category.

"The fallacy of this position is that plaintiff was not a grower's cooperative. It was a cooperative of and acting for and on behalf of its 12,000 members, who were buyers and users of seed corn, and not on behalf of the 20 to 30 farmers with whom it made annual contracts.

* * * * * *

"If the individual farmer produced his own hybrid see, we suppose no question could be made but that all services performed in connection therewith would be agricultural labor within the terms of the statute, and if he directly employed others to perform all or some part of the necessary labor, we think the character of such labor would not be changed. In the instant situation, if the 12,000 farmers comprising plaintiff's membership had collectively or in groups or as individuals entered into contracts with the growers for the production of corn in the same manner as did the plaintiff, we think it would hardly be open to question but that the services rendered by the growers, as well as those rendered by the farmers after receipt of such corn from the growers, would constitute agricultural labor. Here, instead, these 12,000 farmers engaged plaintiff to perform for them a service which would not be practical for them to render for themselves as individuals. Every service rendered by the plaintiff in the process of producing hybrid corn, whether on the land or in its plant, was for and on behalf of its farmer members and was a service essential to their farming operation. To hold that such services were not 'an incident to ordinary farming operations' would, in our view, require us to ignore the realities of the situation and to embrace the mythical." (Underscoring added.)

As shown by the foregoing quotation, the Circuit Court of Appeals was of the opinion that the individual farmers who composed the association were acting through the medium of their association to obtain hybrid seed corn, and that the matter should be viewed as though each individual farmer had made individual contracts with other farmers to grow seed corn in the same general manner as was done for and on behalf of the association. The following quotation is taken from the short dissenting opinion:

"It seems to me that after the corn was removed from the farms of the various growers and had been delivered to plaintiff's plant, plantiff's activity or work was processing, marketing, and selling seed. The services performed were commercial rather than agricultural. And the fact that plaintiff is a co-operative association is immaterial. It must be treated the same as any other individual or corporation."

MEMBERS HELD TO HAVE NO INTEREST IN ASSETS ON DISSOLUTION OF ASSOCIATION

An opinion by Mr. Justice Nathan of the Supreme Court of New York City, reported in the New York Law Journal for January 23, 1950, beginning on page 271, follows:

> "Attinson v. Consumer-Farmer Milk Co-operative, Inc.--Plaintiff, on behalf of himself and other members similarly situated, seeks a declaratory judgment with respect to the distribution of the assets of Consumer-Farmer Milk Co-operative, Inc., a non-stock consumer co-operative.
>
> "The action is brought against the corporation itself, the directors thereof, and the People of the State of New York, all of whom have been served with copies of the summons and complaint. The defendants other than the state have appeared generally, but since they concede the facts alleged in the complaint and also seek an adjudication of the rights of members to corporate assets upon dissolution, they have interposed no answer. The attorney general, on behalf of the people, has moved to vacate the service for lack of consent of the sovereign to be sued, which motion has been granted.
>
> "The trial of this action is thus in the nature of an inquest or a submission on stipulated facts. Although the suit is a friendly one, there is no doubt that a justiciable issue exists.
>
> "The corporate defendant was organized in 1937 pursuant to article 5 of the Co-operative Corporation Law as a consumers' co-operative non-stock corporation. Section 22 of the Co-operative Corporation Law provides that upon voluntary dissolution a duly designated committee 'shall, on behalf of the corporation * * * liquidate its assets, pay its debts and expenses, and divide any surplus among the members as they may be entitled under the certificate of incorporation or by-laws.' Neither the corporate defendant's certificate of incorporation nor its by-laws contains any provision relating to distribution of assets or rights of members upon dissolution.
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> "At a regular meeting of the board of directors on September 20, 1949, the following amendment to the by-laws was duly proposed: 'Upon the dissolution of the corporation, its assets, after payment of all debts and obligations, shall be distributed among the members then in good standing in equal shares.'
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> "Considerable doubt being expressed as to the legality of the proposal, no action was taken, but the proposed amendment

were rendered for and on behalf of the farmer or grower, and services rendered by a growers' cooperative have been found to be in that category.

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is still pending before the board. This action has been brought for a declaratory judgment that, except for current income declared as patronage dividends, members have no proprietary interest in corporate assets and no right to distribution thereof upon dissolution. The prayer for relief also seeks to enjoin the directors from adopting the proposed amendment.

"Since no dissolution is threatened or even contemplated, it does not appear that injunctive relief is appropriate. An invasion or threatened invasion of a present right is not requisite to an action for declaratory judgment, however. Where a judgment will terminate the uncertainty giving rise to the proceeding, will serve a useful purpose in stabilizing legal relations, and will set controversies at rest before they lead to repudiation of obligations or invasion of rights, the power to entertain declaratory judgment actions should be exercised (Post v. Met. Cas. Ins. Co., 227 App. Div., 156).

"The defendant Consumer-Farmer Milk Co-operative, Inc., was an outgrowth of the Milk Consumers Protective Committee, a body of civic-minded persons organized to protect the public's interest in milk processing and distributing, and to alleviate economic ills in the milk industry. After considerable study, it was determined that those objectives could best be obtained by starting an active milk distributing company to operate in the interest of the public and to serve as a 'yardstick' for prices and practices in the industry. The defendant Consumer-Farmer Milk Co-operative, Inc., was thus incorporated. Its bylaws provide: 'The purpose of this society is to organize farmers and consumers for the cooperative distribution of milk and other products, and to do such other things as shall serve the economic and cultural welfare of its members and the public.'

"Briefly stated, the corporate defendant is a community society open to any producer or consumer of milk for a twenty-five cent membership fee. It operates a co-operative venture, purchasing milk from farmers, processing it and selling it to consumers in New York City. Surplus earnings are refunded in the form of patronage dividentds to farmer members in proportion to the amount of milk sold to the corporation, and to consumer members in proportion to the amount of milk bought from it. This actual operation establishes a 'yardstick' for the industry with respect to the price the farmer receives for his milk and the price the city consumer pays for it. The corporation also carries on an extensive public education program relative to the many important problems arising in the producting, processing and marketing of milk. It is thus engaged in a civic enterprise and performs a very valuable public service.

"As a result of the tremendous number of unclaimed patronage divident vouchers, which are printed on every container of milk it sells, and as a result of savings in operations, the corporation has been able to accumulate substantial assets. Have the members of the corporation any rights, vested or contingent in these assets upon dissolution? The court finds that they have not.

"The corporate defendant's purposes and activities are essentially of a charitable and public character. Within the wider definition of that term, it is a charitable corporation (Corporation of the Chamber of Commerce of the State of New York v. Bennett, 143 Misc. 513). Upon dissolution, its assets must be distributed in accordance with the doctrine of cy pres. It is expressly noted, however, that upon questions of exemption from federal, state, or municipal taxation, which are not here presented, differenct considerations may apply, and the corporate defendant is held to be a charitable corporation solely with respect to distribution of assets upon dissolution. Findings of fact and conclusions of law have been waived. Settle judgment accordingly." (Underscoring added.)

Apparently the conclusion of the Justice in the foregoing case was based on the idea that the association's purposes and activities were "essentially of a charitable and public character." It was held "to be a charitable corporation solely with respect to distribution of assets upon dissolution." In the normal situation, and in the absence of specific provisions to the contrary, those who are members at the time of the dissolution of an association are the only persons entitled to share in a distribution of the assets. In this connection, see "Loss of Financial Interest of Members in Association," in Summary No. 20, page 9. For a rather complete description of the character of Consumer-Farmer Milk Cooperative, Inc., see Summary No. 44, page 4.

## RIGHT TO ADMISSION TO MEMBERSHIP

In the case of Porterfield, et al. v. Black Bill & Doney Parks Water Users' Association, decided by the Supreme Court of Arizona, 210 P. 2d 335, the principal question for decision was whether certain persons could compel the association to admit them to membership. The plaintiffs sought:

> "(1) specific performance of an alleged contract between plaintiffs and other residents of the community which plaintiffs allege has been confirmed and ratified by the association; or (2) in the event that specific performance may not be had, that a constructive trust be declared in favor of plaintiffs and that the property of the association be impressed therewith; and in a second cause of action, plaintiffs seek a declaratory judgment under the provisions of sections 27-701 and 27-702, A.C.A. 1939."

On the motion of the association, the trial court dismissed the complaint on the ground that it did not state a cause of action. The plaintiffs then appealed. In reversing the trial court, the Supreme Court of Arizona said in part:

> "We will not consider the first cause of action. This portion of the complaint we believe sufficiently alleges an agreement between all the bona fide residents of the Black Bill and Doney Parks community, including the plaintiffs, to engage in a joint adventure to develop a water supply and construct and maintain a reservoir and distribution system for the benefit of all the residents of that community and to form a corporation as the agency through which such purposes might be accomplished. It alleges in substance that through the joint efforts of all of said residents including plaintiffs, money was procured for the construction of the proposed water system including reservoirs and pipe lines upon the representation and understanding that it was for the benefit of all of the bona fide residents and not merely a few of them; that after the formation of the corporation all of the residents in said community mortgage their property to an agency of the Federal Government to secure a loan of $15,000 to be used in the development of such water supply and system of distribution, and that a lien now exists against the property of plaintiffs and others similarly situated as security for the payment of such loan; that after the association was incorporated plaintiffs and all other residents of the community similarly situated contributed time, labor, and money in the construction of the reservoir and pipe lines of the association and that the association has appropriated said labor and money to its own use and has in writing and otherwise ratified and confirmed the agreement between plaintiffs and others in its articles of incorporation and in its by-laws; that the association has appropriated all of the available water supply in that area and that plaintiffs do not have an adequate remedy at law. * * * * * *

"It is our view that the allegations of the first cause of action not only fully comply with the above requirements but that they are sufficient to meet the requirements of our procedure before the adoption of the Federal rules of Civil Procedure, 28 U.S.C.A. In addition to the allegations relative to the agreement between all of the residents of the Black Bill and Doney Parks community to jointly undertake the development and maintenance of an adequate water supply for the bona fide residents of that community and the allegations that since the incorporation of the association, plaintiffs and others have contributed labor, time and money and have mortgaged their land to secure payment of a loan procured for the purpose of developing said water supply for distribution thereof to said residents, there is attached to said complaint as Exhibits A and B, the articles of incorporation and the by-laws of the association, each of which is made a part of the complaint.

"The articles of incorporation, Article II thereof, provide among other things that the purpose of the corporation was: '* * * to participate in the establishment, maintenance and development of a community water association at Black Bill and Doney Parks, Coconino County, State of Arizona, for the mutual benefit and rehabilitation of the members of the said community, and to do and perform acts necessary, convenient, useful or incidental to the accomplishment of this purpose. * * *.' (Emphasis supplied.)

"Article V thereof provides that: 'Any natural person who qualifies under the provisions hereinafter set forth in the By-Laws of this association and is a bona fide resident of the community shall be eligible to membership in this association; * * *' (Emphasis supplied.)

"The by-laws of said association, Article III, section 1 thereof, provide: 'Any natural person, a bona fide resident or owner of real property in Black Bill and Doney Parks, and a person to whom the services of this association will be beneficial, may become a member of this association. * * *'" (Underscoring added.)

From the foregoing quotations it is clear that the plaintiffs contended that they were entitled to membership in the association because prior to the organization of the association they had entered into an agreement with other bona fide residents of the Black Bill and Doney Parks community to develop a water supply and to construct and maintain a reservoir to distribute water to the residents of the community, and because after the association was incorporated, the plaintiffs and other residents of the community had contributed time, labor, and money in the construction of the reservoir and pipe lines of the association and had mortgaged their land as security for a loan "for the purpose of developing said water supply."

The plaintiffs also contended that provisions in the articles of incorporation and the bylaws of the association constituted an offer of membership to all persons who meet the eligibility requirements. The Court specifically held that the plaintiffs' contentions were well founded. The Court called attention to the fact that the eligibility requirements stated in the charter were more restrictive than those stated in the bylaws, and held that the eligibility requirements as stated in the charter were controlling. In this connection, the Court said:

> "It will be observed that the provisions of the charter are more restrictive than the by-laws with respect to eligibility for membership. The charter provides that to be eligible, one must be a bona fide resident of the community. The by-laws provide that to be eligible one must be either a bona fide resident or owner of real property in Black Bill and Doney Parks (which means the same thing as community), and that the service of the association must be beneficial to such person.
>
> "The charter expressly provides that said person must qualify under the provisions of the by-laws. There is no issue here as to the bona fides of the residence of any of the parties to this litigation which makes the difference in the charter and by-laws immaterial. But for the guidance of the trial court if such issue should hereafter arise, we hold that to be eligible for membership in the association, the applicant must be a natural person, a bona fide resident of the community, and a person to whom the services of the association will be beneficial.
>
> "The provisions of the charter and by-laws prescribing the eligibility for membership must be considered together. However, where the charter is more restrictive in its requirements than the by-laws it is elemental that the charter provisions shall prevail." (Underscoring added.)

In regard to whether the articles of incorporation and the bylaws constituted an offer of membership to all persons who could meet the eligibility requirements, the Court said:

> "In the instant case, the articles of incorporation and the by-laws set up the standard by which the board of directors shall determine whether an applicant is eligible for membership in the association. That standard is clear and unambiguous and is to the effect that if a natural person is a bona fide resident of the community, and is a person to whom the services of the association will be beneficial, he is eligible to be admitted to membership in said association upon making an application in writing therefor upon the form prepared by the secretary of the association. The authroity vested in the board of directors is merely to determine whether the applicant

possesses the qualifications prescribed in the constitution and by-laws of the association. If he does it is mandatory upon the board to admit him to membership. If he does not, he is not entitled to such membership.

* * * * * *

"There is incorporated in the articles of incorporation and the by-laws of the association an offer to any bona fide resident to whom the services of the association will be beneficial the right to become a member of said association upon making application therefor in writing as prescribed by the by-laws. That offer existed at the time plaintiffs and others made application in writing for admission to membership in the association. Plaintiff's application constituted an acceptance of the association's offer. Therefore we do have a written instrument to be interpreted by the court under the provisions of the declaratory judgment law, sections 27-701 and 27-702, supra, since a controversy has arisen concerning the rights of the respective parties in the premises. In arriving at this conclusion the court must of course presume as did the trial judge that the material allegations of the complaint are true." (Underscoring added.)

It is questioned if the holding of the Court in this case represents the general rule of law applicable in the case of ordinary corporations, co-operative or otherwise. In view of all the facts and circumstances in the instant case, there would appear to be compelling reasons for the conclusion that the plaintiffs were entitled to be admitted to membership in the water association. In general, however, it is not believed that requirements for membership, whether stated in the articles of incorporation or in the bylaws, constitute an offer of membership to all persons who meet the requirements. It is believed that rules specifying the conditions that must exist before a person is eligible for membership do not give any such person a right to become a member or stockholder of the corporation in question. A person may not become a member unless he is eligible, but the stating of eligibility requirements does not ordinarily mean that a corporation is compelled to admit all who are eligible. Eligibility usually is not the equivalent of "membership" any more than being eligible for an office means that a person must be elected thereto. Normally, the option to accept or reject an applicant for membership is with the association and not with the applicant.

In the case of ordinary business corporations, they customarily have no eligibility requirements, but on the formation of such a corporation it is believed that they are free to sell stock to some and refuse to sell stock to others. In this regard, it is said in Volume 12 of Fletcher Cyclopedia Corporations [section 5687]:

"Indeed, in the absence of restrictions, it may act arbitrarily, and exclude any persons it may see fit, and the courts have no power to interfere. So when it offers stock for sale, it has the right to select the purchasers, and may sell to one man and refuse to sell to another."

In the case of St. Paul Union Depot Co. v. Minnesota & Northwestern R. Co., 47 Minn. 154, 49 N.W. 646, 13 L.R.A. 415, the Court held that a corporation which had been organized for the specific purpose of furnishing depot and terminal facilities for railroads running into the City of St. Paul was required to sell stock at its par value to a railroad that desired to become a stockholder of this corporation. This conclusion was based on a special statute and on terms and conditions in the articles of incorporation.

As indicated above, however, cases of this character constitute the exception rather than the general rule. (See Legal Phases of Cooperative Associations, page 65.) The case under discussion does indicate that it is advisable to include in any applicable provisions in the articles of incorporation and in the bylaws of a cooperative association stipulations that the only persons who may be members are those who meet certain eligibility requirements, and who are accepted as such by the board of directors of the association; and that the board of directors have the discretion to determine what eligible applicants may be admitted to membership.

## INCOME TAX RETURNS - PATRONAGE REFUNDS - FARMERS

Attention is called to the following statement appearing in the booklet mailed by Collectors of Internal Revenue to taxpayers and entitled "How to Prepare Your U.S. Income Tax Return on Form 1040 for 1949":

> "Farmers who market produce through a cooperative should add to the sales price of the produce, or to ordinary income, any patronage dividends received in the taxable year as a result of such transactions. Farmers who buy, through a cooperative, implements, gasoline, seed, fertilizer, or other items for use in their business should either reduce their deductions for such items by the amount of patronage dividends received or add partronage dividends to income. Patronage dividends received as rebates for purchases of items not used in your business should be omitted from your tax return. Patronage dividends are considered paid to you when remitted in cash, merchandise, stock certificates, or when credited to your account." (Underscoring added.)

In a document issued by the United States Treasury Department in October 1947, entitled "The Taxation of Farmers' Cooperative Associations," the following appears:

> "The exclusion of patronage dividends from corporate gross income is not the exclusive privilege of cooperation [cooperative] associations. Any corporation making payments to its customers under the conditions prescribed by the Commissioner of Internal Revenue and the courts is granted the same treatment. It should be noted, however, that in the case of cooperatives, unlike the case of the typical ordinary corporation, patrons receiving rebates are also the owners of the business.
>
> "The conditions which the cooperative associations must meet if refunds made to their patrons are to be excluded from the gross income of the association may be briefly stated. First, there must have existed at the time of the transaction with the patrons a contractual or other definite obligation on the part of the cooperative to return any net proceeds to him in proportion to patronage without further corporate action. Second, if only members of the association are eligible to receive patronage dividends, exclusion is not allowed on that portion of such distribution which represents profits from transactions with non-members. On the other hand, it is held to be immaterial whether refunds are distributed in the form of cash, stock, certificates of indebtedness, or credit notices. All such forms of payment are regarded as the equivalent of cash distributions in the hands of patrons, the theory being that they are cash payments automatically re-invested under provisions of the charter, by-laws, or other contracts previously agreed to by the patrons." (Underscoring added.)

## CREDIT MEMORANDA - INCOME IN YEAR OF RECEIPT

In the case of Harbor Plywood Corporation v. Commissioner of Internal Revenue, 14 T.C._____, decided by the Tax Court of the United States on January 31, 1950, the only question for decision was whether credit memoranda representing patronage dividends or refunds were income in the hands of the corporation, whose books were kept on an accrual basis in the years in which the credit memoranda were received. The corporation failed to include in its income tax returns the amounts represented by the credit memoranda in the various years in which they were received, and later included the amounts in its income tax returns when they were paid in cash.

The Harbor Plywood Corporation was one of the stockholders "of a cooperative selling association, Pacific Forest Industries. That company . . . was organized as a corporation under the laws of the State of Washington solely for the purpose of exporting plywood and other forest products, as authorized under the provisions of the Webb Export Trade Act."

It appeared that at the close of its accounting year, the cooperative association "pursuant to Article XIII of its bylaws . . . credited to its members all of its income for the year in excess of its operating expenses. Its income consisted of commissions on sales which it made on behalf of its members. It operated on the basis of a fiscal year ending March 31."

"At the close of each of its fiscal years 1943, 1944, and 1945, Pacific issued to petitioner a credit memorandum representing petititoner's proportionate share of the excessive commissions which had been charged to the members on the sales of their products during the year in the respective amounts of $11,591.36, $33,113.41, and $15,996.95. The face amount of each such credit memorandum was credited to the petitioner on the books of the association as of the date of its issuance and was claimed and allowed as an exclusion from gross income in the return filed by Pacific for that year." (Underscoring added.)

In issuing the credit memorandum for the year ended March 31, 1943, the cooperative association said:

> "May we point out, however, that the Treasury Department has filed with us a request for renegotiation of the contracts which we have accepted and are filling. It is, therefore, impossible to distribute the additional price evidenced by the enclosed Credit Memorandum until the results of the renegotiation are known. We believe, however, that the results will be favorable since, in the first place, we are a non-profit organization and secondly, all plywood which we have shipped has gone outside the Continental United States and thus the contracts should not be subject to renegotiation under the law."

Each of the other credit memoranda for the fiscal years 1944 and 1945 were issued subject to the same restriction as to payment. The cooperative

association maintained at all times that it was not subject to renegotiation, "and it was finally sustained in that contention." The Tax Court found that:

> "The renegotiation of Pacific for its fiscal years ended 1943, 1944, and 1945 was barred by the running of the statute of limitations on the dates of March 31, 1944, May 11, 1945, and May 29, 1946, respectively.
>
> "Pacific paid the credit memorandums issued to petitioner for 1943, 1944 and 1945 in cash on the dates of December 12, 1944, January 29, 1946, and July 23, 1946, respectively. The delay of these payments beyond the dates of expiration of the statute of limitations on renegotiation was due to the fact that Pacific had not collected for all of its sales and did not have sufficient cash on hand to make the payments sooner."

The face amount of each of the credit memoranda was credited to the corporation on the books of the cooperative association as of the date of its issuance "and was claimed and allowed as an exclusion from gross income in the return filed by Pacific for that year." (Underscoring added.) The credit memoranda were issued by the cooperative pursuant to paragraphs 2 and 3 of Article XIII of its bylaws, which paragraphs read as follows:

> "2. It is not the purpose of this Association to make a profit; and the commission charged and remuneration received by the Association shall be the cost of transacting its business as sales agent, plus the cost of developing new foreign markets.
>
> "3. If during any fiscal year the total commissions and remuneration received by this Association in such fiscal year exceeds the amount that has been incurred during said fiscal year for the payment by the Association of its expenses, including the cost of market development, then, unless the Board of Trustees by resolution shall direct otherwise, the Treasurer shall, before closing the books as of the close of said fiscal year, return or credit such excess to the accounts of the respective members and associate members, as an addition to the purchase price of the merchandise sold by them . . ."

The Tax Court in holding that the amount of each credit memoranda constituted income to the corporation in the year in which the credit memorandum was received said:

> "Our sole question here is whether the amounts represented by the credit memorandums issued by Pacific are taxable to petitioner in the years when it received them, as contended by the respondent, or in the years when they were paid by Pacific, as petitioner contends; or, as both parties contend in the alternative, in the years when renegotiation of Pacific became barred by the statute of limitations.

"A taxpayer keeping its books and making its returns on an accrual basis must report income when the right to receive it becomes fixed. Spring City Foundry Co. v. Commissioner, 292 U.S. 182. In Liebes & Co. v. Commissioner, 90 Fed. (2d) 932, the court said, after a thorough review of the leading cases dealing with the different aspects of the accrual question:

> "'The complete definition would therefore seem to be that income accrues to a taxpayer, when there arises to him a fixed or unconditional right to receive it, if there is a reasonable expectancy that the right will be converted into money or its equivalent.'

"If there is any contingency as to the taxpayer's right to the income, as distinguished from an uncertainty as to the time of its receipt, it is taxable in the year when the contingency is removed. United States v. Safety Car Heating & Lighting Co., 297 U.S. 88. Here the income in dispute had already been earned and had been credited to the petitioner on the books of Pacific when the credit memorandums were issued. There was no contingency as to the amount of income represented by the credit memorandums or of Pacific's right to receive it; now was there any contingency as to petitioner's right to whatever income might remain after renegotiation, should that occur. The mere possibility of renegotiation did not give rise to a liability which either Pacific or the petitioner could have accrued on its books, since it had not become fixed and was being strenuously protested by Pacific. No liability for renegotiation was set up in Pacific's books. Conceding that there was a possibility of renegotiation there was no way of even approximating the amount of excessive profits that might be claimed by the Government. See Security Flour Mills Co. v. Commissioner, 321 U.S. 281; William Justin Petit, 8 T.C. 228.

"There can be no question but that Pacific, keeping its books on an accrual basis, was required to account for the entire amount of the commissions on sales made during the taxable years." (Underscoring added.)

The Tax Court made the following interesting observation on the right of cooperative associations to exclude patronage dividends or rebates:

"It is now well settled, however, that cooperative associations, such as Pacific, engaged exclusively in selling the products of its stockholder members on a commission basis are not taxable on the income which, pursuant to their articles of incorporation or bylaws, or contracts, they are required to return to the stockholders each year as patronage dividends or rebates. See San Joaquin Valley Poultry Producers' Assn., 136 Fed (2d) 382; Midland Cooperative Wholesale, 44 B.T.A. 824; United Cooperatives, Inc., 4 T.C. 93. This is true whether the amounts are actually paid to the members in cash during the taxable year or merely credited to them on the books of the association. Midland Cooperative Wholesale, supra.

The reason for this rule is that the patronage dividends or rebates are at all times the property of the member stockholders, and non-members, and that the selling association is an agent or trustee or mere conduit for the income." (Underscoring added.)

The taxpayer argued that it did not constructively receive the amounts represented by the credit memoranda in the years in which they were issued. The Court pointed out however that:

"The question of constructive receipt is not involved. It might have been had the petitioner reported on a cash basis rather than an accrual basis." (Underscoring added.)

## TERRITORIAL ORDINANCE RESPECTING PASTEURIZATION PLANTS UNCONSTITUTIONAL

In the case of Moultrie Milk Shed, Inc., v. City of Cairo, et al., decided by the Supreme Court of Georgia on January 12, 1950, 57 S.E. 2d 199, the question for decision was whether an ordinance of the City of Cairo, Georgia, which prohibited the sale of milk within the City limits of Cairo unless it had been pasteurized in a plant located in Grady County--the County in which the City of Cairo is located--was constitutional.

It appeared that there was only one plant for the pasteurization of milk in Grady County, and that the pasteurization plant of the plaintiff was located in Georgia, but outside of Grady County. The license of the plaintiff to sell milk in the City of Cairo was cancelled because it did not have a pasteurization plant in Grady County. One of the agents of the plaintiff had been arrested and convicted because of the sale of milk in the City of Cairo that had not been pasteurized in Grady County.

The City authorities of Cairo had informed the plaintiff and petitioner that notwithstanding the fact that a criminal case against the agent of petitioner had been appealed, it was the intention of the authorities of the City of Cairo "to arrest and prosecute the petitioner and any of its employees and agents who attempt to sell and deliver any milk in the City of Cairo." In view of these conditions, Moultrie Milk Shed, Inc., brought a suit for an injunction against the City of Cairo, its Mayor and Council, and Chief of Police to prevent the defendants from enforcing the ordinance.

The petition of the petitioner alleged:

> ". . . that the ordinance was not intended as a health measure, and did not by its terms afford protection to the public health, but that its sole purpose and effect was to create a trade barrier for the benefit of a named concern, which has the only pasteurizing plant located in Grady County; that pasteurization and distribution of milk is regulated and controlled by State law, with which the petitioner had fully complied; that the petitioner sells only the highest quality of pure, wholesome, and pasteurized milk to all of its customers, many of whom reside in the City of Cairo; that the process of pasteurization is for the purpose of freeing milk from any contamination, and the distance from the pasteurizing plant to the point of consumption is immaterial; that the petitioner's plant and milk are regularly and properly inspected by competent inspectors, and laboratory tests are made by State officials from samples taken by the inspectors and sent to the State laboratory; and that the inspection of all milk in the State is by the above process." (Underscoring added.)

Upon the hearing of the Trial Court, that Court expressed the view that the ordinance in question was unconstitutional, but held that, inasmuch as the validity of the ordinance had been raised apparently in the

proceeding involving the cancelation of the license of the petitioner and also in the criminal case in which one of the petitioner's agents was convicted--each of which was then pending on appeal--an injunction would not be granted.

On appeal to the Supreme Court of Georgia, that Court disposed of the contention that an injunction proceeding could not be successfully maintained under the circumstances in question by saying:

> "The defendants in error contend that the present action is in essence an attempt to enjoin criminal prosecutions, and cite many decisions of this court in support of the statement that equity will not interfere with the administration of criminal law. In Great Atlantic & Pacific Tea Co. v. City of Columbus, 189 Ga. 458, 6 S. E. 2d 320, and again in City of Albany v. Lippitt, 191 Ga. 756, 13 S.E. 2d 807, we undertook to put at rest all uncertainty as to the circumstances under which equity would enjoin a criminal prosecution. It was there pointed out that an exception to the general rule is when injury to property is threatened, and when this is true, injunction will lie notwithstanding the fact that in the process a criminal prosecution is enjoined. The facts in the present case bring it squarely within that exception. It is alleged and admitted that the defendants threatened prosecution of all employees and agents of the petitioner for each and every sale or delivery of milk made within the city. There was also an allegation that, because of this expressed intention, the petitioner is unable to secure the necessary employees for the operation of its business. A plainer case of injury to property could hardly be shown." (Underscoring added.)

The Court then proceeded to hold the ordinance involved invalid, and in doing so said:

> "On the other hand, human dignity and individual freedom demand that one engaged in a lawful business injurious to no one must not be arbitrarily prevented from the legitimate prosecution of his business by city ordinances which set up trade barriers solely for the purpose of protecting a resident against proper competition. If free enterprise is to mean more than mere words, it must not become the victim of arbitrary and discriminatory legislation.
>
> "We have presented above a brief glimpse of the tremendous importance of the question this court is called upon to decide. Where shall the line marking the limit to which legislation to protect the public health may encroach upon freedom of the individual to engage in competitive and legitimate business be drawn? Our decision here will constitute a precedent, a yardstick by which future similar questions must be decided. If this city is held by this court to be justified in restricting the trade in milk as is here done, it would constitute a precedent requiring a holding by this court tomorrow that all other cities could lawfully, upon the theory of protecting the public health, exclude foods such as syrup and pickles

produced in Cairo from the markets in other cities unless they were processed in a plant situated within the county in which such cities are located. The most destructive enemy to free enterprise and individual liberty comes dressed in attractive garments, and is covered with a sugar coating in order that the victim will accept it unaware of its future destruction of his own freedom.

"Similar ordinances have been held void in the following cases: La Franchi v. City of Santa Rosa, 8 Cal. 2d 331, 65 P. 2d 1301, 110 A.L.R. 639; State ex rel. Larson v. City of Minneapolis, 190 Minn. 138, 251 N.W. 121; Sheffield Farms Co. v. Seaman, 114 N.J.L. 455, 177 A. 372, 373; Prescott v. City of Borger, Tex. Civ. App., 158 S.W. 2d 578. On the other hand, in principle, such an ordinance was upheld in Adams v. City of Milwaukee, 144 Wis. 371, 129 N.W. 518, 43 L.R.A., N.S., 1066.

"Our own court in Wright v. Richmond County Dept. of Health, 182 Ga. 651, 186 S.E. 815, upheld an ordinance prohibiting the sale of ice cream manufactured beyond a radius of 60 miles, upon the theory that it was a milk product, was human food, and was easily contaminated. We think that decision distinguishable from the present case on its facts. It does not appear that the process referred to purported in any manner to purify the food and to free it from contamination, while here the process referred to is for the sole purpose of removing bacterial impurities from the milk. There, it did not appear that any tests beyond that of mere casual inspection were employed to discover impurities. Here, the tests are made by State officials, and are precisely the same irrespective of what inspector takes the sample or the location of the milk when the sample is taken. Because of this difference in facts, that decision is no authority for upholding the ordinance here assailed.

"The fact that the pasteurizing plant of the petitioner is located outside of Grady County has no reasonable relation to the matter of protecting the public health which would justify a classification of the petitioner differently from that given another whose pasteurizing plant is located in Grady County. No valid basis for a different classification and discrimination between them as made by the ordinance exists, and there is a denial of equal protection which is guaranteed by both the State and Federal Constitutions.

"In view of the evidence showing that the requirements of the ordinance would in nowise afford protection to the health of consumers, and the fact that the location of the pasteurizing plant has nothing whatever to do with the purity of milk, it is unreasonable to require this petitioner to locate a plant within the county of Grady in order to be permitted to sell milk to the residents of the City of Cairo. It is commendable in a community to support local enterprise, but this must be done in free and open competition without aid from arbitrary and discriminatory legislation." (Underscoring added.)

Attention is called to the fact that a State statute provided for the pasteurization of milk in the State of Georgia. Pasteurization plants were inspected pursuant to this statute. Apparently the ordinance of the City of Cairo did not in any way tend to protect the health of the people of Cairo, and the opinion in the case does not show that any inspections of the pasteurization plant located in Grady County were made by inspectors of the City of Cairo, although in view of all the facts it is questioned if this would have made any difference in the decision of the case.

## OFFICERS, DIRECTORS - STANDARDS OF CONDUCT

The following quotation is taken from the case of Ballantine v. Ferretti, 28 N.Y.S. 2d 668:

> ". . . contracts by which corporate officers or directors take pay for their action as such have such harmful potentialities where there are other stock or creditor interests in the corporation that they are condemned as contrary to public policy because of their nature and general tendency, without inquiry in any given case as to whether harm in fact resulted or complaint actually is made. . . ." (Underscoring added.)